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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

CHRISTOPHER ROCHA,

Defendant and Appellant.

B290690

(Los Angeles County
Super. Ct. No. TA142165)

APPEAL from a judgment of the Superior Court of Los Angeles County. H. Clay Jacke II, Judge. Affirmed as modified.

R.E. Scott & Associates and R.E. Scott, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Kim Aarons and Louis W. Karlin, Deputy Attorneys General, for Plaintiff and Respondent.

Christopher Rocha's probation was revoked for his failure to obey all laws; he was arrested for impersonating a peace officer in violation of Penal Code section 538d, subdivision (a). He contends there is insufficient evidence of fraudulent intent to support the trial court's finding. He also asserts the matter should be remanded for a determination of his ability to pay the various fines and fees imposed. We affirm the judgment, decline to remand for a further hearing on his ability to pay, but correct the abstract of judgment to include fines and penalty assessments that were erroneously omitted.

PROCEDURAL BACKGROUND

On April 4, 2018, Deputy Brandon Zeff observed Rocha at a 7-Eleven in West Hollywood wearing a black jacket with the word "Probation" in large yellow lettering on the back and a Los Angeles County Probation badge printed on the front. Deputy Zeff asked, "Do you work probation?" Rocha mumbled, "yeah." When Deputy Zeff could not understand him, he asked for identification and repeated, "Where do you work at?" Rocha replied, "fuck you." Deputy Zeff detained Rocha outside the 7-Eleven Rocha told him he purchased the jacket at Lynwood Market Place and said he could wear whatever he chooses. Deputy Zeff confirmed with a probation officer that the jacket appeared to be the official jacket typically worn by probation officers. Deputy Zeff arrested Rocha for impersonating a peace officer.

At the time of this arrest, Rocha was on probation for felony possession of PCP. The execution of his four-year sentence had been suspended, and he was placed on three years' probation. Among other probation conditions, the trial court ordered Rocha to "obey all laws" and enter a drug treatment program. Since

then, Rocha twice violated probation. Based on a positive drug test in July 2017, the trial court found him in violation of probation and ordered him to a six-month residential drug treatment program. Rocha walked away from the drug treatment program and the trial court again found him in violation of probation, this time sentencing him to one year in county jail. Probation was reinstated after his release from custody.

A third probation violation hearing was held based on the facts described above. Deputy Zeff testified to his encounter with Rocha and his arrest. Video surveillance of the incident was admitted into evidence. It showed Rocha in the 7-Eleven, initially wearing the jacket inside-out, with the lettering concealed. Shortly before Deputy Zeff arrived, Rocha looked out the window and then changed the jacket so the lettering and the badge were showing on the outside of the jacket.

Rocha testified he believed Deputy Zeff asked him whether he was on probation, not whether he worked for probation. He denied saying or doing anything that indicated he worked for law enforcement. Instead, he told Deputy Zeff he purchased the jacket at Lynwood Market Place. Rocha explained he was at the 7-Eleven with his friend, intending to take pictures with the jacket on. They were standing in line, waiting to pay for his friend's purchases when Deputy Zeff encountered them. Rocha also testified he was familiar with the jackets worn by probation officers and the jacket he wore was different from the official jacket worn by a probation officer because his was thicker and a bomber-style jacket.

The trial court found by a preponderance of the evidence that Rocha falsely impersonated a peace officer in violation of Penal Code section 538d, subdivision (a). The court stated it disbelieved Rocha's testimony, finding it "doesn't make sense" for Deputy Zeff to ask Rocha whether he was on probation without any impetus for the question. Instead, it was more reasonable that the officer questioned whether Rocha worked for probation due to the jacket he was wearing. The court imposed the original four-year term with 534 days of custody credit. Rocha timely appealed.

DISCUSSION

I. The Trial Court Did Not Abuse Its Discretion When It Revoked Probation

Rocha contends the trial court erred in finding he violated probation because there was insufficient evidence to prove he had the intent to fraudulently impersonate a peace officer. We disagree.

Penal Code section 1203.2, subdivision (a), authorizes a trial court to revoke probation if "the court, in its judgment, has reason to believe . . . that the person has violated any of the conditions of his or her supervision" The trial court's decision to revoke probation will not be disturbed on appeal absent an abuse of its "very broad discretion." (*People v. Rodriguez* (1990) 51 Cal.3d 437, 443 (*Rodriguez*)). Discretion is abused when the trial court's decision is arbitrary or capricious or not supported by the facts before the court. (*Ibid.*)

The trial court's factual findings are reviewed for substantial evidence. (*People v. Butcher* (2016) 247 Cal.App.4th 310, 318 (*Butcher*)). "[E]vidence which is insufficient or inadmissible to prove guilt at trial nevertheless may be

considered in determining whether probation should be revoked.” (*In re Coughlin* (1976) 16 Cal.3d 52, 58.) The facts supporting probation revocation need only be proven by a preponderance of the evidence. (*People v. Monette* (1994) 25 Cal.App.4th 1572, 1575; *Rodriguez, supra*, 51 Cal.3d at p. 447.)

Here, it was alleged Rocha violated the probation condition that he obey all laws by impersonating a peace officer. Penal Code section 538d, subdivision (a), provides that a person who is not a peace officer may not “willfully wear . . . the authorized uniform, insignia, [or] emblem . . . of a peace officer, with the intent of fraudulently impersonating a peace officer, or of fraudulently inducing the belief that he or she is a peace officer”

There is substantial evidence to support a finding Rocha violated probation by falsely impersonating a peace officer. Rocha was seen wearing a jacket with “Probation” in large letters in the back and the Los Angeles Probation office badge in the front. Though he initially wore the jacket inside out, Rochas turned it around to display the badge and lettering after he visually scanned the premises. Also, he responded yes when Deputy Zeff asked him about whether he worked for probation. The trial court did not abuse its discretion when it decided to find Rocha in violation of his probation.

Rocha discounts this evidence, contending the only evidence of his state of mind demonstrates he had no intent to impersonate a peace officer or induce the belief he was a peace officer. In support of this contention, he once again claims the officer asked him if he was on probation, not whether he worked for probation. We disagree.

First, the trial court expressly disbelieved Rocha's testimony that the deputy asked him whether he was on probation, not if he worked for probation, finding it "doesn't make sense." We do not reweigh the evidence or determine credibility on appeal. (*Butcher, supra*, 247 Cal.App.4th at p. 318.)

Moreover, there was other evidence of Rocha's fraudulent intent. Even aside from the trial court's finding that Rocha's response to Deputy Zeff indicated he worked for probation, Rocha's conduct in displaying the jacket only after he scanned the premises was circumstantial evidence of his intent to falsely represent himself as a probation officer. This was sufficient circumstantial evidence to demonstrate his state of mind. "Evidence of a defendant's state of mind is almost inevitably circumstantial, but circumstantial evidence is as sufficient as direct evidence to support a conviction." (*People v. Bloom* (1989) 48 Cal.3d 1194, 1208.)

II. The Trial Court Did Not Abuse Its Discretion When It Imposed the Originally Suspended Sentence

Rocha claims the court's statements demonstrated it erroneously believed that it had no alternative other than imposing the unexecuted four-year term. Rocha also argues the court abused its discretion by sentencing him to prison in county jail "for such a minor violation." We are not persuaded.

At sentencing, defense counsel asked the trial court to consider "something other" than imposing the unexecuted four-year county jail prison sentence. The trial court refused, stating, "Unfortunately, I have seen Mr. Rocha several times. And before this, the last time, I gave him a year. He used that time up. So he's used all of his county jail time. [¶] And basically I hoped that he would get his act together so that I would not have to

sentence him to the four years, but unfortunately he still has problems on probation.”

“The decision whether to reinstate probation or terminate probation (and thus send the defendant to prison) rests within the broad discretion of the trial court.” (*People v. Bolian* (2014) 231 Cal.App.4th 1415, 1420.) However, if “the court actually imposes sentence but suspends its *execution*, and the defendant does not challenge the sentence on appeal, but instead commences a probation period reflecting acceptance of that sentence, then the court lacks the power . . . to reduce the imposed sentence once it revokes probation.” (*People v. Howard* (1997) 16 Cal.4th 1081, 1084 (*Howard*); Pen. Code, § 1203.2, subd. (c).)

Here, the trial court fully understood it could reinstate Rocha on probation on the condition he serve an additional period in county jail. It did so previously. Instead, the trial court’s comments indicated Rocha had “used all” of his chances and the court was not inclined to give him a third chance at probation.

The record supports the trial court’s decision. Since his conviction in 2017, Rocha violated probation three times. Further, he was sentenced to one year in county jail in 2018, and was again before the court on a probation violation mere months after his release. Under these circumstances, the trial court’s decision to impose the previously unexecuted sentence was neither arbitrary nor capricious. (*Rodriguez, supra*, 51 Cal.3d at p. 443.) Once the trial court decided that probation was to be denied, pursuant to *Howard* and Penal Code section 1203.2, subdivision (c), the trial court had no choice but to order the previously imposed sentence into effect.

III. Rocha Has Forfeited His *Dueñas*¹ Claim

At the original sentencing hearing, the court imposed a \$50 laboratory analysis fine (Health & Saf. Code, § 11372.5), and penalty assessments of \$50 (Pen. Code, § 1464) plus \$35 (Gov. Code, § 76000).² The trial court also imposed a \$40 court operations assessment (Pen. Code, § 1465.8), a \$30 court facilities assessment (Gov. Code, § 70373), a \$400 restitution fine (Pen. Code, § 1202.4), a \$400 probation revocation fine (Pen. Code, § 12022.44), and a stayed \$400 parole revocation fine (Pen. Code, § 1202.45).

Relying on *Dueñas*, *supra*, 30 Cal.App.5th 1157, Rocha argues these fines and fees must be reversed on due process grounds and his case remanded for a determination of his ability to pay. He did not raise this issue in the trial court. For the reasons set out in *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153–1155 (*Frandsen*), we find the issue forfeited.³ (See also

¹ *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*).

² In the abstract of judgment, the trial court failed to impose the \$50 laboratory analysis fine and the \$85 in total penalty assessments. Because each of these fines and assessments are required to be imposed and were imposed at the initial sentence, we correct the abstract of judgment dated June 12, 2018, to include the fine and penalty assessments. (*People v. Talibdeen* (2002) 27 Cal.4th 1151, 1153.)

³ We note the recent opinion by the Fourth District in *People v. Kopp* (July 31, 2019, D072464) __ Cal.App.5th __ [2019 WL 3451033] (*Kopp*). The *Kopp* court disagreed with *Dueñas* to the extent it applied a due process analysis to restitution fines under Penal Code section 1202.4. The *Kopp* court reasoned that, because restitution fines are punitive, “a defendant should

People v. Gutierrez (2019) 35 Cal.App.5th 1027 [finding forfeiture where defendant failed to object to fines and fees under sections 1202.4, 1465.8, and 290.3, and Government Code sections 70373 and 29550.1, based on inability to pay]; *People v. Bipialaka* (2019) 34 Cal.App.5th 455, 464 [citing *Frandsen* to find *Dueñas* issue forfeited for failure to object in trial court]; *People v. Avila* (2009) 46 Cal.4th 680, 729 [finding forfeiture where the defendant failed to object to imposition of a restitution fine under former section 1202.4 based on inability to pay].)

challenge such fines under the excessive fines clause of the Eighth Amendment of the federal constitution and article I, section 17 of the California Constitution. Put differently, there is no due process requirement that the court hold an ability to pay hearing before imposing a punitive fine and only impose the fine if it determines the defendant can afford to pay it.” The court explained that, to determine whether a fine is constitutionally disproportionate, a court must consider four factors: “(1) the defendant’s culpability; (2) the relationship between the harm and the penalty; (3) the penalties imposed in similar statutes; and (4) the defendant’s ability to pay.” We need not reach this issue because, unlike in *Kopp*, where the defendants raised the ability to pay issue at sentencing, Rocha did not. As we discuss above, he has forfeited the issue on appeal.

DISPOSITION

The abstract of judgment is corrected to reflect the imposition of a \$50 laboratory analysis fine pursuant to Health and Safety Code section 11372.5, and penalty assessments totaling \$85, comprised of the \$50 penalty assessment pursuant to Penal Code section 1464 plus the \$35 assessment pursuant to Government Code section 76000. The judgment is otherwise affirmed.

BIGELOW, P. J.

We Concur:

STRATTON, J.

WILEY, J.